STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 22, 2010
v	No. 291459 Muskegon Circuit Court
D'ANGELO EUGENE CAGE a/k/a DEANGELO EUGENE CAGE, Defendant-Appellant.	LC No. 08-056233-FC

Before: HOEKSTRA, P.J., and JANSEN and BECKERING, JJ.

PER CURIAM.

Defendant was convicted of one count of armed robbery, MCL 750.529, one count of felon in possession of a firearm, MCL 750.224f, one count of assault with a dangerous weapon, MCL 750.82, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b, following a jury trial. The trial court sentenced him as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 19 to 33 years for the armed robbery conviction, 18 months to ten years for the felon in possession conviction, and 18 months to eight years for the assault conviction, as well as two years for each of the felony-firearm convictions, to be served consecutively to the other sentences. Defendant now appeals as of right. We affirm.

I. FACTS AND PROCEDURAL HISTORY

Charles Johnson and Robert Mason testified that on August 14, 2007, at approximately 2:40 a.m., they went to Mason's aunt's house in Muskegon Heights, Michigan to sell her marijuana. They subsequently left the house on foot. They then saw defendant and another man riding a bicycle. Either Johnson or Mason asked them if they were interested in purchasing marijuana. The men did not reply and continued riding. Shortly thereafter, defendant flagged Johnson and Mason down or called out to them. The other man on the bike rode away, but defendant, Johnson, and Mason approached each other.

Defendant indicated that he would like to purchase some marijuana. As Johnson reached into his pocket to retrieve the marijuana, defendant pointed a small silver gun at him and said, "run that shit," meaning that he intended to rob Johnson. Johnson allowed defendant to "run [his] pockets," and defendant took his marijuana and other items. Defendant then pointed the gun at Mason and instructed Mason to give him whatever he had. Mason gave defendant two

lighters from his pocket. While defendant had the gun pointed at Mason, Johnson retrieved a knife from the waistband area of his pants, grabbed defendant's arm, and stabbed defendant in the abdomen with the knife. Defendant yelped, Johnson and defendant tussled, and defendant shot his gun five or six times. The two continued to fight. Defendant then removed his sweatshirt and ran away. Johnson saw defendant's cell phone on the ground and took it. Mason had already started running in the opposite direction, and Johnson followed.

Johnson and Mason met at Mason's other aunt's house. After they arrived, someone at the house called the police. The police subsequently interviewed Johnson and Mason. Johnson testified that he lied to the police at first but then told the truth. He gave the police his knife and defendant's cell phone. He was later charged with and pleaded guilty to felony possession with intent to deliver and carrying a concealed weapon. Mason testified that he also told the police the truth. When the police arrived at the scene of the incident, they found a sweatshirt with a knife cut and blood stains, two shell casings from a .25 automatic weapon, two lighters, and a silver handgun with a casing stuck in it and light splatters of blood on it. The state police crime lab found defendant's DNA on the sweatshirt and the gun.

Shortly after the incident, defendant presented to the emergency room at Hackley Hospital. Tara Blandford, a registered nurse at the hospital, testified that when defendant first arrived, he stated that he had been walking down the street with a friend and was either shot or stabbed. It was later established that he suffered a stab wound. He also had scratches or cuts on one of his hands, which he claimed he got jumping over a fence, as well as on one of his thighs. Defendant did not mention marijuana or being robbed. Blandford took a pair of bloodstained jeans and a small silver bullet, among other things, from defendant and later turned the items over to the police. The bullet was for a .25 automatic weapon.

Sergeant Gary Cheatum testified that he spoke with defendant in the early morning hours of August 14, the day of the incident at issue. The sergeant, along with another officer, entered defendant's room in the emergency room of the hospital and defendant agreed to speak with the sergeant. Sergeant Cheatum first asked defendant what had happened to him. Defendant said that he and his friend were walking down the street when he received a cell phone call; he sat down on the curb and talked on the phone; when he stood back up, he was attacked by a black man who grabbed his shirt; defendant felt pain in his stomach and believed he was shot; the man then chased him through yards and over fences; and, eventually, defendant found a friend who gave him a ride to the hospital. The sergeant then asked if defendant knew whether he was stabbed or shot, and defendant said that he was stabbed, but that a gun had gone off. When the sergeant attempted to clarify what had happened, defendant indicated that the black man must have stabbed him and shot the gun. He said that there was a white man present who was standing further away, but that he did not do the stabbing or shooting. Defendant denied having any weapons. The sergeant then asked why the police had found a "live round" in defendant's clothing. Defendant "mumbled something about a clip and then he didn't want to talk any more." Defendant did not mention marijuana or being robbed. He was arrested after his release from the hospital.

Following his jury trial, defendant was convicted and sentenced as described. Defendant then filed a claim of appeal in this Court. Thereafter, he filed an untimely motion to remand for a *Ginther* hearing[1] to determine whether defense counsel was ineffective for failing to move at or before sentencing to present mitigation evidence and to move to suppress defendant's statements to the police, among other things. This Court denied the motion. *People v Cage*, unpublished order of the Court of Appeals, entered October 20, 2009 (Docket No. 291459). Defendant subsequently filed a second untimely motion to remand so that he could move for resentencing on the ground that he was erroneously sentenced as a third habitual offender. This Court again denied defendant's motion. *People v Cage*, unpublished order of the Court of Appeals, entered June 4, 2010 (Docket No. 291459).

II. DEFENDANT'S STATEMENTS TO THE POLICE

Defendant first argues that the trial court erred in admitting the statements he made to the police while in the emergency room of the hospital and that his trial counsel was ineffective in failing to move to suppress the statements. We disagree.

Defendant did not object to the admission of his statements before the trial court. We review unpreserved claims of evidentiary error for plain error affecting the defendant's substantial rights, "i.e., that the error affected the outcome of the lower court proceedings." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Reversal is warranted only if the error "resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity or public reputation of judicial proceedings." *Id*. (quotation marks and citation omitted).

A claim of ineffective assistance of counsel should be raised by a motion for a new trial or an evidentiary hearing pursuant to *Ginther*, 390 Mich at 443. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). As indicated, defendant filed an untimely motion to remand for a *Ginther* hearing on this issue. But this Court denied the motion. Therefore, our review is limited to the existing record. See *id*. To establish ineffective assistance of counsel, defendant must show that his trial counsel's performance was so deficient that it fell below an objective standard of reasonableness and denied him a fair trial. *People v Henry*, 239 Mich App 140, 145-146; 607 NW2d 767 (1999). Furthermore, defendant must show that, but for counsel's error, it is likely that the proceeding's outcome would have been different. *Id*. at 146. Effective assistance of counsel is presumed; therefore, defendant must overcome the presumption that counsel's performance constituted sound trial strategy. *Id*.

Both the United States and Michigan Constitutions guarantee the right against self-incrimination. U.S. Const, Am V; Const 1963, art 1, § 17. Generally, statements of an accused made during custodial interrogation are inadmissible unless, prior to any questioning, the accused was warned that he had a right to remain silent, that his statements could be used against him, and that he had the right to counsel, and that the accused voluntarily, knowingly and intelligently waived his rights. *Miranda v Arizona*, 384 US 436, 444; 86 S Ct 1602; 16 L Ed 2d

[1] See *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

694 (1966); *People v Daoud*, 462 Mich 621, 633; 614 NW2d 152 (2000); *People v Harris*, 261 Mich App 44, 55; 680 NW2d 17 (2004). A police "officer's obligation to give *Miranda* warnings to a person attaches only when the person is in custody." *People v Peerenboom*, 224 Mich App 195, 197; 568 NW2d 153 (1997).

Contrary to defendant's argument on appeal, he was not in custody at the time he made his statements to Sergeant Cheatum. To be in custody means "that the person has been formally arrested or subjected to a restraint on freedom of movement of the degree associated with a formal arrest." *Id*. "To determine whether a defendant was in custody at the time of the interrogation, we look at the totality of the circumstances with the key question being whether the accused reasonably could have believed that he was not free to leave." *People v Zahn*, 234 Mich App 438, 449; 594 NW2d 120 (1999). In *Peerenboom*, 224 Mich App at 197, the defendant was hospitalized due to severe injuries she suffered in an explosion. Police interviewed her three times in her hospital room. *Id*. This Court held that the defendant was not in custody at the time of the interviews because she was not under arrest and no formal restraint was placed on her freedom of movement. *Id*. at 197-198. See also *People v Kulpinski*, 243 Mich App 8, 24-26; 620 NW2d 537 (2000) (holding that the defendant was not in custody when questioned by the police although he was on a cot in the hospital wearing a neck brace). In this case, defendant was not under arrest at the time of the police interview, and although he may not have been able to leave his hospital room because of his injuries and upcoming surgery, he was not under any formal restraint or otherwise restrained by the police. Defendant voluntarily agreed to speak with Sergeant Cheatum, the interview lasted a relatively short amount of time, and defendant was not arrested until after his release from the hospital. The mere fact that defendant was injured and in the hospital does not establish that he was coerced into speaking to the police. Considering the totality of the circumstances, defendant was not in custody at the time of the interview.

Furthermore, even if defendant had been in custody when Sergeant Cheatum interviewed him, the sergeant read defendant his *Miranda* rights, and defendant voluntarily, knowingly and intelligently waived them. In determining whether a statement was voluntarily made, we must consider the totality of the circumstances and whether those circumstances indicate that the statement was voluntarily and freely given. *People v Cipriano*, 431 Mich 315, 333-334; 429 NW2d 781 (1988). "A confession or waiver of constitutional rights must be made without intimidation, coercion, or deception . . . and must be the product of an essentially free and unconstrained choice by its maker." *People v Akins*, 259 Mich App 545, 564; 675 NW2d 863 (2003) (citation omitted). In *Cipriano*, the Supreme Court indicated a non-exhaustive list of factors to consider, including:

> The age of the accused; his lack of education or his intelligence level; the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused

> was physically abused; and whether the suspect was threatened with abuse. [*Cipriano*, 431 Mich at 334.]

Here, Sergeant Cheatum, along with another officer, entered defendant's room in the emergency room of the hospital and asked defendant if he could speak with him. Defendant said yes. The sergeant then read defendant his *Miranda* rights, defendant again agreed to speak with the sergeant, and then the sergeant began the interview. Sergeant Cheatum first asked defendant what had happened to him and then, based on defendant's response, asked a series of follow-up questions. The interview lasted a relatively short amount of time and ended when defendant indicated that he no longer wished to talk about the incident. Defendant argues that his statements were involuntary because his hospital room was a coercive, intimidating atmosphere and because Sergeant Cheatum failed to confirm whether defendant was under sedation. As indicated, the fact that defendant was injured and hospitalized does not, in and of itself, establish that he was subjected to police coercion. Moreover, defendant does not claim nor has he submitted any evidence suggesting that he was actually sedated at the time of the interview. Sergeant Cheatum testified that he did not believe defendant was sedated, defendant was able to carry on a normal conversation, and he seemed to understand the sergeant's questions. We must conclude, based on the totality of the circumstances, that defendant's statements were voluntary.

The police properly obtained defendant's statements. Defendant has not established that the trial court plainly erred in admitting the statements or that defense counsel was ineffective in failing to move to suppress them. Counsel cannot be deemed ineffective for failing to make a futile motion. *People v Darden*, 230 Mich App 597, 605; 585 NW2d 27 (1998).

III. DEFENDANT'S SENTENCE

Defendant also raises numerous challenges to the sentence imposed by the trial court. Generally, we review a trial court's factual findings at sentencing for clear error. *People v Mack*, 265 Mich App 122, 125; 695 NW2d 342 (2005). The proper application of the statutory sentencing guidelines presents a question of law that we review de novo. *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001). A sentencing court has discretion in determining the number of points to score for each variable, provided that record evidence adequately supports a given score. *People v Endres*, 269 Mich App 414, 417; 711 NW2d 398 (2006). We review unpreserved sentencing challenges for plain error affecting the defendant's substantial rights. *People v Kimble*, 470 Mich 305, 312; 684 NW2d 669 (2004); *Carines*, 460 Mich at 763.

A. OV 19

Defendant argues that the trial court erred in scoring offense variable (OV) 19, MCL 777.49, at ten points or, alternatively, that his trial counsel was ineffective for failing to challenge the scoring. But defendant effectively waived any challenge to the scoring of OV 19. In *People v Carter*, 462 Mich 206, 215, 219; 612 NW2d 144 (2000), our Supreme Court discussed the principle of waiver:

> Waiver has been defined as "the 'intentional relinquishment or abandonment of a known right.'" It differs from forfeiture, which has been explained as "the failure to make the timely assertion of a right." "One who waives his rights under a rule

> may not then seek appellate review of a claimed deprivation of those rights, for his waiver has extinguished any error."
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> * * *
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> In the present case, counsel clearly expressed satisfaction with the trial court's decision to refuse the jury's request and its subsequent instruction. This action effected a waiver. Because defendant waived, as opposed to forfeited, his rights under the rule, there is no "error" to review. [Citations omitted.]

In this case, defense counsel expressed satisfaction with the PSIR and its scoring determinations, affirmatively indicating at sentencing that no corrections or additions needed to be made to the PSIR. Accordingly, the issue was waived for purposes of appellate review.

Even if we reviewed this issue, however, resentencing would not be necessary. Ten points are scored for OV 19 where the defendant has "interfered with or attempted to interfere with the administration of justice." MCL 777.49(c). Contrary to defendant's assertion on appeal, such conduct "does not have to necessarily rise to the level of a chargeable offense because it is merely being used as one of various factors to determine a defendant's sentencing guidelines range." *People v Barbee*, 470 Mich 283, 287; 681 NW2d 348 (2004). There is no indication in the record why the trial court scored OV 19 at ten points. But even if OV 19 was scored in error,[2] reducing defendant's total OV score by ten points would not change the minimum sentencing guidelines range. Therefore, resentencing would not be required, see *People v Davis*, 468 Mich 77, 83; 658 NW2d 800 (2003), and defense counsel cannot be deemed ineffective for failing to raise an objection, see *Henry*, 239 Mich App at 146.

B. REMAINING SENTENCING CHALLENGES

Defendant additionally argues that the trial court erred in imposing a sentence violative of our federal and state constitutions and that his trial counsel was ineffective for failing to object. We disagree.

First, defendant argues that the trial court erred in sentencing him as a third habitual offender. Defendant claimed in his second untimely motion to remand that he was erroneously sentenced as a third habitual offender. This Court denied the motion. Further, defendant did not object to the enhancement of his sentence on the same grounds that he now asserts. Therefore,

[2] The prosecution asserts on appeal that the variable was scored at ten points because defendant "did not cooperate in leading police to the gun" and "tried to get rid of the gun, for it was found on top of a trash can in someone else's yard." The testimony at trial supported a conclusion that defendant attempted to get rid of the gun he used in the assault and armed robbery and that he did not volunteer the gun's location to the police. But, again, there is no indication in the record that the trial court based the scoring of OV 19 on those facts. Further, it is arguable that scoring OV 19 on such a basis would not be proper. Given that it would be extraordinary for a criminal defendant not to attempt to hide evidence of his or her crime, OV 19 would be scored in almost every case. See *People v Spangler*, 480 Mich 947, 948; 741 NW2d 25 (2007).

this issue in unpreserved and must be reviewed for plain error affecting defendant's substantial rights. See *Kimble*, 470 Mich at 312; *Carines*, 460 Mich at 763.

Defendant does not assert that he does not have the requisite number of prior felony convictions to be sentenced as a third habitual offender. Rather, he asserts that the sentence was improper because MCL 769.11 did not require his sentence to be enhanced, and the trial court failed to articulate why the sentence was proportionate to the offense and the offender. We find, however, that the trial court properly enhanced defendant's sentence under the statutory guidelines for habitual offenders. MCL 769.11(1) provides that if "a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies . . . and that person commits a subsequent felony . . . , the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows." The statute further provides that the trial court "may sentence the person to imprisonment for a maximum term that is not more than twice the longest term prescribed by law for a first conviction of that offense or for a lesser term." MCL 769.11(1)(a). Defendant does not dispute that his sentence fell within these statutory guidelines. At sentencing, the trial court stated that it believed defendant's sentence was proportionate, within the guidelines, and warranted by the seriousness of defendant's conduct and prior criminal record. A minimum sentence within the statutory guidelines range is presumed to be proportionate, and defendant has failed to present any unusual circumstances that would overcome that presumption. See *People v Hogan*, 225 Mich App 431, 437; 571 NW2d 737 (1997).

Defendant next argues that the trial court erred in failing to consider all mitigating evidence at sentencing and, therefore, that his sentence was based on inaccurate and incomplete information. Defendant asserts that his trial counsel failed to present any mitigating evidence to the trial court, but counsel did, in fact, bring some allegedly mitigating evidence to the attention of the court at sentencing. To the extent that this issue is preserved, factual findings should be reviewed for clear error, *Mack*, 265 Mich App at 125, questions of law reviewed de novo, *Hegwood*, 465 Mich at 436, and the ultimate sentence reviewed for an abuse of discretion, *Endres*, 269 Mich App at 417. To the extent the issue is unpreserved, it must be reviewed for plain error affecting defendant's substantial rights. See *Kimble*, 470 Mich at 312; *Carines*, 460 Mich at 763. Defendant filed an untimely motion to remand for a *Ginther* hearing on this issue, which this Court denied. Therefore, this Court's review is limited to mistakes apparent on the record. See *Rodriguez*, 251 Mich App at 38.

According to defendant, the trial court should have considered his strong family support, remorse for his crimes, and drug and alcohol addictions in imposing his sentence. But review of the PSIR reveals that the trial court was privy to all of the evidence listed by defendant. The PSIR contained information regarding defendant's history of alcohol and drug abuse, as well as a letter written by defendant expressing his remorse and a letter written by his grandmother expressing family support. At sentencing, defense counsel brought the court's attention to the letters. Further, as acknowledged by defendant, a sentencing court is not required to consider mitigating evidence under Michigan law. Here, the trial court properly articulated the reasons for its sentencing decision, which consisted of referring to the guidelines and noting that defendant had a relatively lengthy and serious criminal record. See *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006). Defendant's prior criminal record underscores his inability to conform his conduct to the rules of society and supports the trial court's sentencing

decision, see *People v Hansford*, 454 Mich 320, 326; 562 NW2d 460 (1997), and his assertion that he is remorseful should not be considered a mitigating factor because it is impossible to judge a defendant's subjective intent, see *People v Daniel*, 462 Mich 1, 8 n 9; 609 NW2d 557 (2000). Additionally, there is no factual support for any assertion that defendant was affected by alcohol or drug use at the time of the instant offenses.

Defendant also argues that the trial court should have conducted an assessment of his rehabilitative potential under MCR 6.425(A)(5). MCR 6.425 requires a probation officer to conduct an investigation and complete a presentence report. The report "must be succinct" and, "depending on the circumstances," must include "the defendant's medical history, substance abuse history, if any, and, if indicated, a current psychological or psychiatric report." MCR 6.425(A)(5). Here, the trial court was provided with a PSIR that noted defendant's medical condition, which was unremarkable with no history of psychiatric treatment, and his substance abuse history. Contrary to defendant's argument on appeal, the plain language of MCR 6.425(A)(5) does not require an examination of rehabilitative potential. All required information was included in the PSIR.

Finally, defendant argues that he was denied his constitutional rights to due process and equal protection because his sentence was not supported by facts he had admitted or that were found beyond a reasonable doubt as required under *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), and that his sentence constituted cruel and unusual punishment. Defendant's argument ignores the holdings in *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006), and its progeny that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. Furthermore, any sentence within the guidelines is presumptively proportionate and, being proportionate, cannot constitute cruel or unusual punishment. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008).

Defendant does not argue that his sentence falls outside of the legislative guidelines. Pursuant to MCL 769.34(10), "a sentence within the guidelines range must be affirmed on appeal unless the trial court erred in scoring the guidelines or relied on inaccurate information." *Powell*, 278 Mich App at 323. Defendant has not established a scoring error, that any of the information on which the trial court relied was inaccurate or incomplete, or that the court failed to properly consider the evidence before it. Therefore, we must uphold defendant's sentence, see *id.*; MCL 769.34(10), and his ineffective assistance of counsel claim must fail, see *Henry*, 239 Mich App at 146.

Affirmed.

/s/ Kathleen Jansen
/s/ Jane M. Beckering